

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 2007-50
	)	
SU MEI ZHENG,	)	
	)	
Defendant.	)	
_____	)	

ATTORNEYS:

**Everard A. Potter, AUSA**  
St. Thomas, U.S.V.I.  
*For the Plaintiff,*

**Jesse A. Gessin, AFPD**  
St. Thomas, U.S.V.I.  
*For the defendant.*

ORDER

**GÓMEZ, C.J.**

Before the Court is the motion of the defendant, Su Mei Zheng ("Zheng"), to dismiss the indictment on double jeopardy grounds.

The trial in the above-captioned matter took place on December 17, 2007. The parties rested and the matter went to the jury. After approximately three hours of deliberations, the jury sent the Court a note indicating that they were deadlocked and could not reach a unanimous verdict. After consulting with

counsel, the Court instructed the jury to deliberate further (the "Allen charge"), consistent with *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 935-36 (3d Cir. 1974).

After approximately thirty additional minutes of deliberations, the jury again indicated that they could not reach a verdict. The Court again conferred with counsel, and thereafter declared a mistrial. The Court found that manifest necessity required such a declaration, given the jury's inability to reach a unanimous verdict.

The Double Jeopardy Clause protects criminal defendants from later prosecutions for the same offense. See U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). Double jeopardy bars successive prosecutions where "the two offenses charged are in law and in fact the same offense." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985); *cf. United States v. Felix*, 503 U.S. 378, 387 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation."). However, the Double Jeopardy Clause will not bar successive prosecutions for the same offense where a mistrial is required by "manifest necessity." *United States v. Rivera*, 384 F.3d 49, 53 (3d Cir. 1991); *see also United States v. Console*, 13 F.3d 641, 663-64 (3d Cir. 1993) (explaining that Double Jeopardy will not

bar re-prosecution unless the issue has been "necessarily determined in the defendant's favor by a valid and final judgment").

Manifest necessity is present when the circumstances leave the trial judge with "no alternative to the declaration of a mistrial. The trial judge must consider and exhaust all other possibilities." *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997) (citing *United States v. McKoy*, 591 F.2d 218, 222 (3d Cir. 1979)).

Here, the jurors deliberated for several hours. After receiving the *Allen* charge and again deliberating, the jurors were still unable to come to a unanimous decision. As a result, the Court, after consulting with counsel, held that manifest necessity required the declaration of a mistrial. Under these circumstances, Double Jeopardy will not prevent retrial of Zheng.<sup>1</sup> See *Arizona v. Washington*, 434 U.S. 497, 509 (1978)

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<sup>1</sup> Zheng argues that the *Allen* charge was premature. That argument is without merit. On its own initiative, the jury plainly indicated in a note to the Court -- without any inquiry from the Court -- that it could not reach a unanimous verdict. The Court, in its discretion, then gave the *Allen* charge. That sequence of events is consistent with the case law of the Third Circuit and of other circuits. See, e.g., *United States v. Graham*, 758 F.2d 879, 884 (3d Cir. 1985) ("The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion.") (citation omitted); *United States v. Martinez*, 446 F.2d 118, 120

("[P]erhaps the clearest example of a situation in which manifest necessity exists for a mistrial is when a jury is unable to reach a verdict."); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988) (recognizing the 'manifest necessity' of retrial following a hung jury); *see also United States v. Chestaro*, 197 F.3d 600, 603 (1st Cir. 1999) (affirming a conviction in a retrial and noting that the district court declared a mistrial in the first trial after the jury deliberated for several hours, was given an *Allen* charge, and announced that it was deadlocked); *United States v. Robuck*, 690 F.2d 794, 794 (10th Cir. 1982) (affirming the district court's denial of the defendant's motion to dismiss on double jeopardy grounds where the court declared a mistrial after the jury deliberated for several hours and "indicated to the court its inability to reach a verdict"); *Campbell v. Brunnelle*, 925 F. Supp. 150, 159 (S.D.N.Y. 1995) (noting that many reviewing courts have "upheld the trial court's declaration of a mistrial after as little as three or four hours deliberation where . . . the case was short, the issues simple,

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(2d Cir. 1971)("[W]e [will] not place an arbitrary time limit on how long a jury must deliberate before an *Allen* charge is appropriate."); *cf. United States v. Contreras*, 463 F.2d 773, 774 (9th Cir. 1972) (reversing a conviction where the trial judge *sua sponte* gave the jury an *Allen* charge).

and the jury declared itself deadlocked").<sup>2</sup>

For the reasons stated above, it is hereby

**ORDERED** that Zheng's motion to dismiss is **DENIED**.

**Dated: February 20, 2008**

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

Copy: Everard A. Potter, AUSA  
Jesse A. Gessin, AFD

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<sup>2</sup> Zheng cites *United States ex rel. Webb v. Court of Common Pleas of Philadelphia County*, 516 F.2d 1034 (3d Cir. 1975), for the proposition that no manifest necessity existed for a mistrial. In *Webb*, the Third Circuit held that Double Jeopardy barred retrial after a mistrial because it found that no manifest necessity existed for the trial judge's declaration of a mistrial due to a hung jury. *Webb*, 516 F.2d at 1043-44. However *Webb* is distinguishable from this case because the trial judge raised the issue of jury deadlock *sua sponte*. *Id.* at 1036. The trial judge interrogated only the jury foreman as to state of jury's deliberations, and the foreman indicated that further deliberation would be fruitless. *Id.* Here, in contrast, the issue of jury deadlock was raised by the jury itself, which sent two different notes indicating that it could not reach a unanimous verdict. Moreover, this Court, unlike the trial court in *Webb*, gave the jury an *Allen* charge after and instructed it to continue deliberations after receiving the first note. Accordingly, the Court considers *Webb* to be inapposite.